FANNING, PHILLIPS & MOLNAR

CONTRACT NO. V526P-3108

VABCA-3856E

VA MEDICAL CENTER
BRONX, NEW YORK

Gary A. Molnar, P.E., Principal, Fanning, Phillips & Molnar, Ronkonkoma, New York, for the Appellant.

Paul A. Embroski, Esq., Trial Attorney; ***Charlma Jones, Esq***., Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE ROBINSON

Fanning, Phillips & Molnar (FPM, A/E or Applicant) has submitted a timely application in accordance with the *Equal Access to Justice Act* (*EAJA* or *Act*), 5 U.S.C. § 504, to recover its fees and expenses incurred litigating the underlying appeal. The Board's initial decision is reported at 96-1 BCA ¶ 28,214. Our decision on reconsideration is at 96-2 BCA ¶ 28,427. Familiarity with these decisions is presumed.

The Applicant asserts that it meets the eligibility requirements of the *EAJA* with respect to its net worth and number of employees, and has provided us with adequate supporting evidence in that regard. The Department of Veterans Affairs (VA or Government) has not challenged that assertion. The Board finds that FPM is eligible for consideration of an award under the *EAJA*.

The Applicant (on reconsideration) achieved a significant measure of the relief which it sought in VABCA No. 3856, and contends that it is a *prevailing party*, a position with which the VA does not take issue, and with which we agree.

SUBSTANTIAL JUSTIFICATION

The Government points to the fact that the Board initially declined to award any equitable adjustment to FPM, as a basis for its *substantial justification* in refusing the A/E's claim. While the Board denied FPM any monetary award, based on a perceived lack of proof of quantum, we nevertheless did find basic legal entitlement in connection with several of the changes to the original scope of the design contract, a position which the Government challenged throughout the proceeding. On reconsideration, after being persuaded by FPM that there was, in fact, sufficient evidence of record to fashion a jury verdict, the Board awarded an equitable adjustment of $16,500. A total of $49,741 had been claimed. In appraising the reasonableness of the Government's position, the Board must examine the totality of this litigation, including our original overly conservative view of the evidence. The Board's initial restrictive approach to the evidence does not inure to the benefit of the Government. It is the Government's independent burden to establish that it's position had "a reasonable basis both in law and fact." ***Pierce v. Underwood***, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550 (1988). In our view, this burden has not been met.

The Board interpreted FAR clause 52.236-22, DESIGN WITHIN FUNDING LIMITATIONS (APR 1984), by reading the plain language and comparing the two subparagraphs (which were worded quite differently) to provide that an A/E bear the costs of necessary redesign after bids had been opened, all of which exceeded the construction cost estimate and available funding (had it previously failed to warn the Government of the possibility); and that the Government bear the cost of scope changes when given adequate advance warning by the A/E as to the probable excessive cost of construction. We do not consider our interpretation to be particularly novel, nor do we understand why the Government refused to recognize the distinction. *See, e.g., **ABC Health Care***, VABCA No. 3462E, 94-3 BCA ¶ 27,013 at 134,638.

Laying aside the issue of quantum, the Contracting Officer failed to recognize the merit of any of the Appellant's several claims of scope changes to the basic design. Because of that position, the CO was not receptive to any sort of proof of damages offered by FPM. The Board found entitlement, in both its initial decision and on reconsideration, without resort to any new or novel application of basic government contract law. For the above stated reasons, we find that the position of the Government was without substantial justification.

COMPUTATION OF ALLOWABLE FEES/EXPENSES

This appeal, VABCA No. 3856, was consolidated with VABCA No. 3964, which is currently not before us. The Applicant has requested reimbursement of **$83,588.46**, consisting of the following types of fees and expenses allegedly incurred in connection with VABCA No. 3856: 1) for eight named FPM employees (engineers, draftsmen & secretaries), the total of wages paid for all hours worked on *both appeals* was shown as $7,695, which has been apportioned by the Applicant at 81.42% (**$6,265.51**) for this appeal only; 2) for the salary paid to Gary Molnar, a partner in the firm, for 489.77 hours (@ $50 per hr.) plus overhead and profit (**$67,654.87**); 3) for the salary, plus overhead and profit, of an FPM employee who performed 184.61 hours of clerical and secretarial services related to this appeal for Mr. Molnar (**$7,869.69)**; 4) for "Other Fees and Expenses," as follows:

Item Amount

H. P. Fritz, Esq. $2,000.00

Travel (Errichiello) 51.75

Long Distance 18.50

Overnight Delivery 138.53

Total $2,208.78

Total, VABCA-3856 @ 81.42% = **$1,798.39**

With the exception of services rendered by H. P. Fritz, Esquire, all of the work for which reimbursement is sought was done by the Applicant's own employees.

The underlying appeal, VABCA No. 3856, consumed only a portion of Applicant's overall litigation efforts. Because of this, the Applicant has suggested an apportionment consistent with the actual amount of money at issue in the underlying appeal. While the total claimed in VABCA No. 3964 was $11,351.90, the amount sought in VABCA No. 3856 was $49,741.31. The Applicant's proposed formula is explained as follows:

Where certain tasks were co-mingled with VABCA-3964,

it isproposed to use a direct proportion to the amount of claims.

Thus, the proportion allocable to VABCA-3856 would be:

$49,741.31 ÷ (11,351.90 + 49,741.31) = 81.42%

The Government has objected to the apportionment formula in this appeal. Counsel urges the Board instead to consider the ratio between the amount sought ($49,741.31) and the amount awarded by the Board ($16,500) in granting any of the fees and expenses requested. Where several appeals are litigated together, the Board must initially apportion the litigation effort between the several appeals. In this particular litigation, our familiarity with these two appeals leads us to conclude that the roughly 4 to 1 ratio proposed in the Applicant's formula is reflective of the degree of time and effort devoted to the two underlying disputes during the hearing and the briefing. For this reason, we will apportion in accordance with the Applicant's proposed percentage.

We must also determine whether the Applicant is entitled to all of the fees/costs so apportioned to VABCA No. 3856, or some ratio between the amount sought ($49,743.31) and the amount actually awarded by the Board ($16,500). This would result in a recovery of 27% of all eligible and reasonable fees and expenses - an approach urged by the Government. If we were considering the claimed efforts of Mr. Molnar and his many employees who allegedly worked on these appeals, such an approach might be appropriate. However, for reasons to be discussed *infra*., the salaries of those individuals are not reimbursable under the *EAJA*. Only the fees and expenses listed in Item #4 are eligible for an award. Based upon our examination of the record in these two appeals, we are satisfied that the fees and expenses reflected in Item #4 were necessarily expended by the Applicant in order to recover even the $16,500 which the Board awarded in connection with this appeal. For this reason, we will allow 100% of any reasonable fees/expenses listed under Item #4.

Because the *EAJA* is a surrender of sovereign immunity, it must be strictly construed. ***Fidelity Construction v. United States***, 700 F.2d 1379 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 826 (1983). The *Act* speaks of "reasonable attorney fees." As such, the courts have limited recovery of attorney fees to those paid individuals licensed to practice law. ***Naekel v. Department of Transportation***, 845 F.2d 976 (Fed. Cir. 1988); ***Merrell v. Block***, 809 F.2d 639 (9th Cir. 1987); ***Crooker v. Environmental Protection Agency***, 763 F.2d 16 (1st Cir. 1985). Consistent with these judicial holdings, the boards have held that an appellant who appears without benefit of counsel is not entitled to reimbursement for the salaries paid to its officers or employees in connection with such *pro se* representation and prosecution of its appeal. ***Preston-Brady, Inc.***, VABCA No. 1992E, 88-1 BCA ¶ 20,446; ***M. Bianchi of California***, ASBCA No. 26362 *et al*, 90-1 BCA ¶

22,369 at 112,404; ***J.V. Bailey Co., Inc.***, ENG BCA No. 5348-F, 91-3 BCA ¶ 24,350; ***J. J. Seifert Machine Co., Inc.***, ASBCA No. 41398, 92-1 BCA ¶ 24,608.

The Applicant stresses that 5 U.S.C., Section 504(b), the administrative version of the *EAJA*, expressly authorizes reimbursement of a prevailing party's costs for the services of "agents" as well as "attorneys." So stating, it characterizes Mr. Molnar, a partner in the firm, as the *agent* for the partnership in its dealings with the Government and the Board. The Armed Services Board, in ***Roberts Construction Company***, ASBCA No. 31033, 86-2 BCA ¶ 18,846, was presented with a similar request for recovery of an employee's salary. The Board examined the legislative history of the *EAJA*, finding that Congress had specifically rejected language in a similar then-pending bill which would have expressly included "the cost of the party's personal absence from business at an hourly rate." ***Roberts,*** at 94,794. We consider the analysis by the Armed Services Board in ***Roberts***, that an appellant's lost opportunity costs are not covered by the *EAJA*, to be an accurate assessment of the Congressional intent in enacting the statute. Thus the cost of employees' time devoted to the litigation, no matter how effective or productive, was not intended to be recoverable under the *EAJA*.

The "agents" referenced in the *EAJA* have been construed to be outside non-lawyer professionals such as *accountants* who render litigation-related services to contractor-appellants: ***J.V.Bailey Co., Inc.***, ENG BCA No. 5348-F, 91-3 BCA ¶ 24,530; ***American Power, Inc.***, GSBCA No. 10558-C(8752), 91-2 BCA ¶ 23,766; ***Delfour, Inc.***, VABCA No. 2049E *et al*, 90-3 BCA ¶ 23,066; ***M. Bianchi of California*** at 112,405; ***Petro Elec Construction Co., Inc.***, ASBCA No. 32999 *et al*, 87-3 BCA ¶ 20,111. We can find no instance where any board or court has interpreted the term "agent" to include a salaried employee or partner of an *EAJA* applicant.

The *EAJA* statute was intended to "level the playing field" so that small businesses which litigated against the Government could avail themselves of legal and professional assistance otherwise affordable only by larger entities doing business with the Government. As the Armed Services Board discussed in ***Roberts***, it was the intent of Congress that small business contractors litigating before the boards not be disadvantaged when confronted by the "greater resources and expertise of the United States." This imbalance of resources was specifically rectified by providing for recovery under *EAJA* of fees and expenses incurred in obtaining qualified attorneys, agents, and/or expert witnesses not ordinarily available to the contractor. As Judge Freeman stated: "Where, as in this instance, a regular employee of a contractor prosecutes an uncomplicated claim on an issue that is within the ordinary expertise of the contractor's business, there is no imbalance of resources affecting adjudication of the claim." ***Roberts,*** at 94,974.

The reasoning employed in the above-cited cases and appeals has been likewise applied to preclude reimbursement for the salaries paid to applicants' employees who furnish what would be characterized as "litigation support services." ***Danrenke Corp.***, VABCA Nos. 3601E *et al.,* 94-1 BCA ¶ 26,504; ***Labco Construction, Inc.***, AGBCA No. 95-104-10, 95-2 BCA ¶ 27,677. Only fees paid to outside consultants or independent expert witnesses qualify for reimbursement. Neither lay witness fees nor salaries paid employees who consult or appear as expert witnesses are recoverable under the *EAJA*. ***Danrenke Corp.***; ***Quality Diesel Engines, Inc.***, GSBCA No. 11237-C *et al*., 91-3 BCA ¶

24,331 at 121,567-68.

An interesting conundrum was presented in ***Gaffny Corporation***, ASBCA No. 39740 *et al*, 96-1 BCA ¶ 28,060, *aff'd on motion for reconsid.,* 96-1 BCA ¶ 28,138, *rev'd sub nom*., ***John H. Dalton, Secretary of the Navy v. Gaffny Corporation***, No. 96-1331, *unpublished slip op*., 16 FPD ¶ 19 (Fed. Cir., Feb. 13, 1997). The Armed Services Board, over the strong dissent of one member of the panel, had concluded that the Appellant's corporate president, who had originally appeared *pro se* for his company and had offered sworn testimony on its behalf at the hearing, was properly to be considered as its in-house corporate counsel. It reached this decision because Mr. Gaffny had at some point included the traditional attorney designation "Esq." after his signature. This was considered sufficient to have established Gaffny as an attorney acting on Appellant's behalf. The majority relied on an earlier decision in which the Board had carved out a narrow exception to its otherwise consistent position that salaries paid to an appellant's employees could not be reimbursed under the *EAJA*. ***D.E.W., Incorporated***, ASBCA No. 36698, 90-3 BCA ¶ 23,019.

In reversing that Board's decision, the Federal Circuit held that the Board lacked substantial evidence to have concluded that Mr. Gaffny was, in fact, a licensed attorney acting as in-house counsel for the Appellant, particularly since he had earlier indicated the *pro se* nature of his representation and had testified as a witness at the hearing. Because of its narrow holding regarding the evidentiary basis for the Board's decision, the Court gave no indication of its position regarding reimbursement for in-house corporate counsel fees. However, inherent in its reversal of the Board's decision is the obvious position that when an appellant's officer or employee acts in a representative (*pro se)* capacity and appears as a witness during a board hearing, there is no legitimate basis for reimbursement of his salary under the *EAJA*.

The Applicant directs our attention to the Board's own "PROCEDURES FOR CLAIMS UNDER SECTION 504 OF TITLE 5 0F THE UNITED STATED CODE," which provide for payment of agent/employee "fees." It points to Paragraph 6(c)(1), which states, that in determining the reasonableness of fees sought for attorneys, agents or expert witnesses, the Board shall consider, *inter alia*, the following:

If the attorney, agent or witness is in private practice, his

or her customary fee for similar services, *or, if an employee*

of the applicant, the fully allocated cost of the services.

(Emphasis added)

The above-cited PROCEDURES are based on the Administrative Conference of the United States Revised Model Rules, published in the Federal Register on May 6, 1986. They were utilized by the Board because the Department of Veterans Affairs (then the Veterans Administration) had not issued agency rules on the *EAJA*. No such DVA rules have ever been approved by OMB for publication. The PROCEDURES thus are useful only as guidance. To the extent that any portion of these PROCEDURES is read to broaden an applicant's recovery beyond that clearly intended by the Congress, it is

invalid as the basis for a fee award.

The *EAJA* does not define the term "agent." Absent any such definition, the boards have uniformly determined that the Congress did not intend to reverse the long-standing policy of confining recovery of fees and expenses to those incurred in connection with efforts of outside attorneys and other outside professionals necessary to the *EAJA* applicant's litigation with the Government. This Board's unpublished PROCEDURES, insofar as they purport to broaden an applicant's right of recovery beyond that intended by the Congress, are invalid and cannot be the basis of an award. Sovereign immunity may only be waived by duly enacted legislation specifically providing therefor. ***Fidelity Construction v. United States***, 700 F.2d 1379.

In light of the above, the Board cannot reimburse the Applicant for any of the salaries which it paid its officers and employees, no matter what involvement they may have had with the litigation of the underlying appeal. Our perusal of the time sheets supporting Mr. Molnar's efforts reveals that he was acting as a partner and employee of FPM - not as an agent specifically hired to assist the firm with this litigation. In addition to his *pro se* representation of FPM at the hearing, he was the one and only *fact witness* testifying for the Appellant. For these reasons, no portion of his salary is recoverable by the Applicant.

The remaining category for which Applicant seeks reimbursement is termed "Other Fees and Expenses." In VABCA No. 3964E, the substantiation for the $2,000 fee paid to an attorney, H. P. Fritz, was his August 1, 1994 bill for services and the Applicant's check for payment of same. The Board refused to award any fees for Attorney Fritz because the August 1994 bill was totally lacking in specificity. As a part of *this* Application, FPM has submitted a revised bill from Attorney Fritz, dated December 5, 1996. In the 1996 bill, Fritz explains that between December, 1993 and August, 1994 (the month the hearing was held), he rendered at least 20 hours of legal services to FPM in connection with VABCA Nos. 3856 and 3964. There were twelve hours billed for five meetings and consultations in which Attorney Fritz discussed the appeals and gave legal advice to Mr. Molnar. In addition, there were six hours of legal research which included three visits to the Nassau County, New York, Supreme Court law library, and two hours were expended in preparation and submission to FPM of memoranda concerning the results of the attorney's legal research.

Although the revised billing still lacks the degree of specificity which the Board would have preferred, it nevertheless appears that the efforts were made by the attorney and were reasonable with regard to the legal issues which were involved in these two appeals. For this reason, we will accept Attorney Fritz's 1996 revised billing as sufficient to establish the legal services rendered on behalf of the Applicant. As we have stated, we consider the Fritz billings acceptable under the particular circumstances of this litigation. Accordingly, the attorney fee recovery is as follows: 20 hours X $75 (hourly cap in effect at time of litigation) = $1,500. 81.42% of $1,500 is **$1,221.30**, which we award the Applicant.

The prorated express delivery charges appear to be reasonable and are allowed. This Board has previously held that reimbursement for these types of costs is equally available to parties acting *pro se* as are similar costs incurred by attorneys. ***Preston-Brady Co., Inc.***, 88-1- BCA at 103,391-92, *citing* ***Oliveira v. United States***, 827 F.2d 735 (Fed. Cir.

1987) and ***Merrell v. Block*****,** 809 F.2d 639 (9th Cir. 1987); ***Fletcher & Sons, Inc.***, VABCA No. 3248E, 93-1 BCA ¶ 25,472. We will utilize the Applicant's apportionment formula, allowing the cost of overnight express delivery, calculated as follows: $138.53 x 81.42% = **$112.80**.

oth the travel and long distance telephone costs were incurred by Mr. Errichiello, also a salaried employee of the A/E. This individual offered expert testimony pertaining to several of the issues involved in VABCA No. 3856, including the development of construction cost estimates as well as various aspects of the design scope changes for which the Board ultimately awarded equitable adjustments to FPM. The Applicant is entitled to recover reasonable costs incurred by Mr. Errichiello in connection with his testimony for VABCA No. 3856. The costs incurred by Mr. Errichiello in long distance calls to suppliers for price quotes ($18.50), as well as his travel expenses ($51.75), appear to be reasonable. The reasonableness of these expenditures is not disputed by the Government. The apportioned total, therefore, is **$57.20** ($70.25 x 81.42%).

DECISION

For the reasons given, the Applicant may recover only the apportioned costs of attorney fees, at $1,221.30; overnight express delivery, at $112.80, and; long distance calls and necessary travel, at $57.20; for a total of **$1,391.30**. All other amounts claimed are disallowed.

DATE: **June 2, 1997**

JAMES K. ROBINSON
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III
Chief Administrative Judge

MORRIS PULLARA, JR.
Administrative Judge